

MAR 15 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

_____**78-1421**_____
No. _____

GEORGE FRANKLIN CARTER, III,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States.

GEORGE FRANKLIN CARTER, III, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Seventh Circuit Court of Appeals entered in the above entitled case on February 15, 1979.

OPINION BELOW

The opinion of the appeals court of February 15, 1979, affirming the conviction of petitioner is not officially reported (Appendix A, *infra*).

JURISDICTION

The judgment of the Court below (Appendix A, *infra*, page 7) was entered on February 15, 1979. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Whether an interrogation and routine search of a traveler's luggage, which reveals nothing unusual is sufficient grounds for a more intensive cooperative search by Customs inspectors and DEA agents?

Whether a Drug Enforcement Administration agent may, without probable cause, jointly participate with a United States Customs Inspector in a warrantless border search of a traveler's person and luggage?

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. United States Constitution Amendment IV. The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

2. *Law Enforcement in Illicit Drug Activities*. Reorganization Plan No. 2 of 1973. The following plan prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 28, 1973, pursuant to the provisions of Chapter 9 Title 5 of the United States Code (5 U.S.C.S. §§ 901 et seq.) and amended Mar. 16, 1974, P. L. 93-253, § 1, 88 Stat. 50, became effective July 1, 1973. Section 1. Transfers to the Attorney General. There are hereby transferred from the Secretary of the Treasury, the Department of the Treasury, and any other officer or any agency of the Department of the Treasury, to the Attorney General all intelligence, investigative, and law enforcement functions, vested by law in the Secretary, the Department, officers, or agencies which relate to the suppression of illicit traffic in narcotics, dangerous drugs, or marihuana, *except that the Secretary shall retain, and continue to perform, those functions, to the extent that they relate to searches and seizures of illicit narcotics, dangerous drugs, or marihuana or to the apprehension or detention of persons in connection therewith, at regular inspection locations at ports of entry or anywhere along the land or water borders of the United States: Provided, that any illicit narcotics, dangerous drugs, marihuana, or related evi-*

dence seized, and any person apprehended or detained by the Secretary or any officer of the Department of the Treasury, pursuant to the authority retained in them by virtue of this section, shall be turned over forthwith to the jurisdiction of the Attorney General; Provided further, that nothing in this section shall be construed as limiting in any way, any authority vested by law in the Secretary of Treasury, the Department of the Treasury, or any other agency of that Department on the effective date of this Plan with respect to contraband other than illicit narcotics, dangerous drugs, and marihuana: and Provided further, that nothing in this section shall be construed as limiting in any way any authority the Attorney General, the Department of Justice, or any other officer or any agency of that Department may enforcement activities, including activities relating to the suppression of illicit traffic in narcotics, dangerous drugs, and marihuana, at ports of entry or along the land and water borders of the United States.

3. Title 5 U.S.C. § 905. Limitations on powers.—(a) A reorganization plan may not provide for, and a reorganization under this chapter (§§ 901-9B of this title) may not have the effect of—

(4) authorizing an agency to exercise a function which is not expressly authorized by law at the time the plan is transmitted to Congress;

4. Title 19 U.S.C. § 482. Customs Duties—Enforcement Provisions. Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall *suspect* there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner con-

trary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a *reasonable cause to suspect* there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

STATEMENT

On February 8, 1978 the petitioner arrived at the international terminal at O'Hare Field in Chicago, Illinois after a non-stop flight from Amsterdam, Holland. He was cleared through immigration and he proceeded to the United States Customs inspection line with his luggage. Petitioner's luggage consisted of a brown vinyl suitcase, a blue garment bag, and a sealed, yellow plastic shopping bag which contained duty-free purchased cigarettes and liquor from a duty-free shop in the Amsterdam airport.

The Customs Inspector, David Gooding, asked petitioner a series of routine questions, and wrote some of petitioner's answers to those questions on the back of petitioner's customs declaration form. Inspector Gooding examined the contents of the brown vinyl suitcase and found nothing unusual. Petitioner was then ordered to proceed to a small secondary search room located away from the main customs area. Agent John Whittington of the Drug Enforcement Administration, on his own volition, immediately followed petitioner and the customs inspector into the secondary search room.

Inside the search room inspector Gooding instructed Petitioner to empty his pockets on the table. Petitioner placed a large quantity of American bills on the table along with his receipt for the purchase of cigarettes and vodka. Gooding then searched Petitioner's overcoat and found another large quantity of bills. The facts are in dispute as to the dialog that occurred between Gooding and Petitioner regarding Petitioner's answer to questions about his money.

The Customs inspector claimed that when he first asked Petitioner if he was carrying more than five thousand dollars Petitioner replied that he was carrying two thousand

dollars. He further claimed that after he discovered more money in Petitioner's overcoat he again asked Petitioner if he was carrying more than five thousand dollars and Petitioner stated "five thousand and no more." Petitioner testified that his answer to both questions was "A few thousand dollars."

The facts were also in dispute as to whether government's exhibit number one, a piece of tin foil, containing a minute amount of white powdery substance was recovered from the inside suitcoat jacket of Petitioner. The Customs inspector claimed that he removed a small, one-half inch square, piece of foil from Petitioner's inside suitcoat pocket, opened it, observed a small amount of white powder, refolded it and placed it inside his pants pocket.

Petitioner testified that the Customs Inspector did not remove a piece of tin foil from his pocket.

The Customs inspector then closed the door of the search room and he and agent Whittington performed a strip search upon Petitioner. They did not observe any weapons and they instructed Petitioner to redress. The Customs inspector left Petitioner alone with agent Whittington and went to get a form that is required for passengers carrying more than five thousand dollars. While the Customs inspector was away, agent Whittington maintained custody of Petitioner and counted his money. Inspector Gooding returned with the form and instructed Petitioner in how to complete it, and again left Petitioner alone with Whittington. Gooding returned with Petitioner's luggage and left all three bags on the floor of the hallway outside the search room.

Gooding then asked permission to observe Petitioner while Petitioner completed the negotiable instruments form. After giving Petitioner additional instructions, Gooding

again left Petitioner in Whittington's custody and carried the brown suitcase and blue garment bag into another search room and examined them.

While Gooding was searching the luggage, U.S. Customs Inspector Edward Gross arrived at the search room. Agent Whittington asked Gross whether the yellow duty-free bag on the floor of the hallway belonged to Petitioner. Both Gross and Whittington looked into the bag and observed a bottle of vodka and four cartons of cigarettes. Inspector Gross took a knife and cut the green Amsterdam tape that sealed the top of the bag. Whittington and Gross each removed cigarette cartons, and Whittington asked Petitioner what was inside. Petitioner replied "Cigarettes, go ahead and open them." Whittington then instructed Gross that the cigarettes should be opened.

Inspector Gooding returned to the hallway and picked up the yellow duty-free bag and took it into the other search room. Agent Whittington followed Gooding, observed him open the cartons and individual packages, and saw the white powdery substance. Agent Whittington's partner performed a field test for heroin and agent Whittington then formally placed Petitioner under arrest.

Petitioner was charged in a two count indictment with the importation of a controlled substance (21, U.S.C. 952(a)) and with possession with the intention to distribute a controlled substance (21, U.S.C. 841(a)(1)).

The first trial of this matter was heard before the Honorable John P. Crowley and a jury. Appropriate pre-trial motions to suppress the physical evidence were filed and after a hearing were denied. The matter was then tried before the jury which, after lengthy deliberation, announced that it was hopelessly deadlocked. Judge Crowley declared a mistrial on March 22, 1978.

The second trial was heard before the Honorable Joel M. Flaum and a jury. Judge Flaum granted defendant leave to adopt the pre-trial motions filed in the first trial before Judge Crowley, and without a hearing, denied defendant's motion to suppress the physical evidence. Following the trial before Judge Flaum and a jury the defendant was found and adjudged guilty of both counts in the indictment. Appropriate post-trial motions were filed, but denied. Petitioner was sentenced to the custody of the Attorney General for a period of twelve years on each count, said sentences to run concurrently and a \$15,000.00 fine on count one.

REASONS FOR GRANTING THE WRIT

This court should examine and clearly articulate the constitutional validity of a joint, Drug Enforcement Administration-Customs Bureau border search, as it affects the constitutional rights guaranteed by the fourth amendment to the Constitution of the United States.

Searches by customs officials are common but on occasion present problems that are unique in the area of Fourth Amendment rights. Since the first border search statute was enacted in 1789, customs officials have been authorized to stop and examine any vehicle, person, or baggage arriving in the United States on *suspicion* that merchandise is concealed which is subject to duty or which cannot legally be imported in the United States. 19 U.S.C. § 482 (1964). This statutory power is supplemented by regulations promulgated by the Secretary of the Treasury and which deal with the search of persons and baggage 19 U.S.C.A. § 1582 (1964).

The Presidential Reorganization Plan No. 2 of 1973 specifically reserved to the Secretary of the Treasury, the exclusive duty to conduct searches of travellers and their belongings at ports of entry. This same Reorganization Plan has been judicially interpreted to authorize concurrent authority by the Drug Enforcement Administration to also conduct warrantless searches without probable cause, of travelers and their belongings at borders and ports of entry. *United States v. Bates*, 526 F. 2d 966, 967 (5th Cir. 1976); *United States v. Ortega*, 471 F. 2d 1350, 1360 (2d Cir. 1972), Cert. denied, 411 U.S. 948 (1973); *United States v. Carter*, No. 78-1666, (7th Cir. 1979).

It is the contention of the petitioner that warrantless border searches without probable cause by agents of the Drug Enforcement Administration was neither authorized nor contemplated by the Presidential Reorganization Plan No. 2. That the developing judicial interpretations of cooperative efforts between the Customs Bureau and DEA represent the engraftment of an unconstitutional exception to the warrant clause of the Fourth Amendment to the Constitution of the United States.

The petitioner further contends that Reorganization Plan No. 2, is controlled by the Limitation of Powers section of Title 5 §§ 905(a)(4) which provides that;

- (a) A reorganization plan may not provide and an reorganization under this chapter may not have the effect of—
- (4) authorizing an agency to exercise a function which is not expressly authorized by law at the time the plan is transmitted to Congress.

Agents of the Drug Enforcement Administration have never been authorized to conduct or participate in warrantless border searches, without probable cause. Whether the authority of DEA agents may be extended to fall within an exemption from the requirements of probable cause should be settled by this Court.

The petitioner further contends that the doctrine of joint participation enunciated by this Court in *Byars v. United States*, 273 U.S. 28 (1927) and *Lusting v. United States*, 338 U.S. 74 (1949) should be applied to warrantless border searches conducted by the combined efforts of U.S. Customs inspectors and Drug Enforcement Administration agents.

CONCLUSION

For the foregoing reasons this petition of a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

No. 78-1666
UNITED STATES OF AMERICA,
Plaintiff-Applee,

v.
GEORGE FRANKLIN CARTER,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 78 CR 68—JOEL M. FLAUM, Judge.

Argued January 4, 1979—Decided February 15, 1979.

Before CUMMINGS, SPRECHER and BAUER, Circuit
Judges.

SPRECHER, Circuit Judge. This appeal raises the question of whether a Drug Enforcement Administration agent may participate with customs inspectors in conducting a border search. We hold that there is neither constitutional nor statutory infirmity in such participation under the circumstances of this case.

I

The defendant arrived at the international terminal at O'Hare Airport in Chicago on February 8, 1978, terminating a nonstop flight from Amsterdam, Netherlands. He passed through immigration, retrieved his luggage, consisting of a brown vinyl suitcase, a blue garment bag, and a yellow duty-free bag, and proceeded to the customs inspection area. He handed his customs declaration form, airline ticket and passport to Customs Inspector Gooding, who asked routine questions and inspected the brown suitcase.

The defendant was then taken to a secondary search room by Gooding, where they were immediately joined by Drug Enforcement Administration agent Whittington. Gooding asked the defendant to empty his pockets onto a table in the search room, which resulted in the defendant's removal of a large quantity of United States currency. Gooding then requested the defendant to remove his overcoat which Gooding examined and in which he found another large quantity of currency. Gooding then requested the defendant to remove his suitcoat which Gooding examined and in which he found a folded tinfoil packet holding a white, powdery substance later determined to contain heroin.

At this point, Gooding's supervisor, Customs Inspector Knezev appeared in the secondary search room, and Knezev obtained a small plastic bag into which the tinfoil packet was placed. Knezev also ordered Gooding to conduct a strip search of the defendant. Gooding, with Whittington still present, conducted the strip search.

As the defendant dressed, Gooding left the search room to obtain a form necessary when more than \$5,000 in currency is brought into the country. While Gooding was ab-

sent, Whittington counted the money. When he returned the defendant filled out the currency form. Gooding then left the defendant with Whittington while he carried the brown suitcase and the blue garment bag into another search room and inspected them. At that time, Knezev returned with Customs Inspector Gross, who joined Whittington and the defendant.

The yellow duty-free bag had remained in the hallway outside the secondary search room, where Gross and Whittington examined it and found it to contain a bottle of vodka and four cartons of cigarettes. Gross cut the tape which sealed the bag shut and removed a carton. Whittington removed a second carton and asked the defendant, "What is in here, besides cigarettes?" The defendant appeared to become somewhat nervous and responded, "Nothing, go ahead, open them, if you want to." The cartons were returned to the yellow bag.

Gooding returned and picked up the yellow bag which he proceeded to inspect. Upon removing one of the cigarette cartons, he noted that it felt heavy and resisted pressure when squeezed. He opened the carton and removed one of the individual packs which also resisted pressure when squeezed and shook when rattled. He opened the pack and found a plastic bag containing a white powdery substance. A second pack produced the same result.

Whittington, who had been present, then instructed his DEA partner to test the substance. The test revealed that the substance contained an opiate. It developed that 36 of the 40 cigarette packs contained a total of 930.40 grams of heroin, 786.16 grams of which were 85% pure and 144.24 grams of which were 84% pure. The tinfoil packet contained .02 grams of heroin.

Whittington arrested the defendant and Gooding turned over to Whittington the duty-free bag and its contents, as well as the tinfoil packet. Gooding took custody of the \$6,969 in currency.

The defendant was charged in a two-count indictment with intentional importation and possession with intent to distribute heroin in violation of 21 U.S.C. §§ 952(a) and 841(a) (1). He was found guilty of both counts by a jury and was sentenced to 12 years' imprisonment on each count, to run concurrently, to be followed by a three-year mandatory special parole term. The defendant was also fined \$15,000.

II

The defendant argued on appeal that the search was unconstitutionally conducted because of the participation by the DEA agent with the customs inspectors. In his presentation the defendant has not given full consideration to the unique nature of a border search.

A search of a passenger and his luggage upon arriving by airplane at O'Hare Airport after a nonstop flight from Amsterdam is the functional equivalent of a border search. *United States v. Brown*, 499 F. 2d 829 (7th Cir.), *cert. denied*, 419 U.S. 1047 (1974). Searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into the country, are reasonable simply by virtue of the fact that they occur at the border. *United States v. Ramsey*, 431 U.S. 606, 616 (1977). Routine inspections and searches of individuals or conveyances seeking to cross the borders or their functional equivalents are not subject to the warrant provisions of the Fourth Amendment. *Almeida-Sanchez v. United States*, 413 U.S. 266,

272 (1973).¹ See also *United States v. Odland*, 502 F. 2d 148, 150-51 (7th Cir.), *cert. denied*, 419 U.S. 1088 (1974).

Customs officers characteristically and properly inspect luggage. "[I]t is an old practice and is intimately associated with excluding articles from the country." *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971).² Also, those entering the country may be examined as to their "belongings and effects" without violating the Fourth Amendment. *California Bankers Association v. Schultz*, 416 U.S. 21, 62-63 (1974). Belongings and effects have been held to include the contents of a person's purse, wallet or pockets. *Henderson v. United States*, 390 F. 2d 805, 808 (9th Cir. 1967). See also *United States v. Flores*, 477 F. 2d 608, 609 (1st Cir.), *cert. denied*, 414 U.S. 841 (1973); *United States v. Summerfield*, 421 F. 2d 684, 685 (9th Cir. 1970).

The discovery of incriminating matter during routine searches is "reasonable cause to suspect" that a more intensive search will produce more contraband. Customs agents customarily proceed from the less intrusive to

1. The Court in *Almeida-Sanchez* stated that, for example, "a search of the passengers and cargo of an airline arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search." 413 U.S. at 273.

2. The statute authorizing border searches expressly provides that any customs officer "may . . . search any trunk or envelope . . . in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law. . . ." 19 U.S.C. § 482. The statute authorizing the Secretary of Treasury to prescribe regulations for border searches speaks of searching "persons and baggage." 19 U.S.C. § 1582.

the more intrusive form of search. *United States v. Afanador*, 567 F. 2d 1325, 1329 n. 4 (5th Cir. 1978); *United States v. Asbury*, 586 F. 2d 973, 976 (2d Cir. 1978).

The defendant's argument is centered on the fact that a DEA agent was involved with the customs inspectors in conducting the search of the luggage, belongings and effects of the defendant.

Customs officials under the supervision of the Secretary of Treasury and drug enforcement officials under the supervision of the United States Attorney General have traditionally cooperated and exercised some joint powers over drugs searched for and seized in border searches.³ The present relationship between these kinds of federal officers is detailed in Reorganization Plan No. 2 of 1973,⁴

3. In *United States v. Ortega*, 471 F. 2d 1350 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973), the court said "[w]e may remark, parenthetically, that a combination of customs agents and agents of the Bureau of Narcotics and Dangerous Drugs made an examination of the Jaguar and its contents in the hold of the Elizabeth II as she came up the harbor and one of the 180 bags of heroin was removed for testing." *Id.* at 1353-54. The court concluded that "[t]he search by a Customs Agent and others helping him, in the hold of the Elizabeth II while still in midstream, was clearly proper as a border search." *Id.* at 1360.

See also *United States v. Thompson*, 475 F. 2d 1359 (5th Cir. 1973) (respective powers of customs agents and border patrol officers who are employees of the Immigration and Naturalization Service under the supervision of the United States Attorney General).

4. Effective July 1, 1973, 38 F.R. 15932, 87 Stat. 1091, as amended March 16, 1974, Pub. L. 93-253, § 1, 88 Stat. 50, 28 U.S.C. § 509 annotation, promulgated pursuant to 5 U.S.C. §§ 902-12.

which provides that all intelligence, investigative and law enforcement functions vested in the Secretary of Treasury which relate to the suppression of illicit traffic in drugs are transferred to the Attorney General

except that the Secretary shall retain, and continue to perform, those functions, to the extent that they relate to searches and seizures of illicit narcotics, dangerous drugs, or marihuana or to the apprehension or detention of persons in connection therewith, at regular inspection locations at ports of entry or anywhere along the land or water borders of the United States: *Provided*, that any illicit narcotics, dangerous drugs, marihuana, or related evidence seized, and any person apprehended or detained by the Secretary or any officer of the Department of the Treasury, pursuant to the authority retained in them by virtue of this section, shall be turned over forthwith to the jurisdiction of the Attorney General . . . and *Provided further*, that nothing in this section shall be construed as limiting in any way any authority the Attorney General, the Department of Justice, or any other officer or any agency of that Department may otherwise have to make investigations or engage in law enforcement activities, including activities relating to the suppression of illicit traffic in narcotics, dangerous drugs, and marihuana, at ports of entry or along the land and water borders of the United States.

Section 1, Reorganization Plan No. 2, 28 U.S.C. § 509 annotation.

The Reorganization Plan contemplates the very kind of cooperation and joint effort engaged in by the officers in this case. The DEA agent was primarily an onlooker until the tinfoil packet of heroin was found in the defendant's pocket, whereupon his participation became somewhat more active. After the sizeable quantity of drugs was discovered, he made the arrest and the evidence was "turned over

forthwith" to him by the customs inspector. The search was proper in every way.

The defendant sought to rely upon *Byars v. United States*, 273 U.S. 28 (1927), holding that when a federal officer participates officially with state officers in a search, the constitutionality of that search is to be tested as though it were an official federal search and not merely as a state or private search, the fruits of which would be fully usable by federal officers. The issue posed by *Byars* is not present here; the search here was an acknowledged federal search governed by border search standards. Defendant's reliance upon *United States v. Chadwick*, 433 U.S. 1 (1977), is also misplaced since *Chadwick* does not deal with a border search.

III

We find no merit in the defendant's second argument that the evidence was insufficient to show knowing possession of heroin.

The judgment of conviction is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of
Appeals for the Seventh Circuit